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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

SARA B. HAZEN,
*Petitioner,*
V.
EVELYN B. COOPER, ET AL.,
*Respondents.*

**On Petition for Writ of Certiorari to The Court of Appeals for The Fourteenth Supreme Judicial District of Texas**

## PETITION FOR WRIT OF CERTIORARI

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78 pp

## QUESTION PRESENTED FOR REVIEW

Whether the practice of a judge receiving political campaign contributions from litigants and/or their attorneys creates an appearance of impropriety under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requiring the judge to be recused.

## LIST OF ALL PARTIES

Petitioner:

SARA B. HAZEN, Individually and as Temporary Administrator of the Estate of Rose D. Bashara, Deceased

Respondents:

EVELYN B. COOPER, Individually and as Trustee of the Evelyn B. Cooper and Melburn G. Cooper Trust

MELBURN G. COOPER, Individually and as Trustee of the Evelyn B. Cooper and Melburn G. Cooper Trust

ISABELL TRADD, Individually and as Guardian of Rose D. Bashara, N.C.M.

EVELYN B. COOPER AND MELBURN G. COOPER TRUST

WILLIAM AMAIMO, Individually and as Guardian of the Estate of Rose D. Bashara, N.C.M.

FIRST CITY NATIONAL BANK now FEDERAL DEPOSIT INSURANCE CORPORATION

AMERICAN BANK AND TRUST

LIDDELL, SAPP, ZIVLEY AND LABOON

BRUCE LABOON

ROBERT BROWN

GRACE GREENE

EARNEST G. CALDWELL

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**On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas**

## PETITION FOR WRIT OF CERTIORARI

Sara B. Hazen respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas in this case.

## REFERENCE TO THE OPINIONS OF THE COURTS BELOW

Petitioner's motion for recusal (App.,*infra*, 16a) filed in the trial court was denied by order signed on September 23, 1993, (App.,*infra*, 29a). The trial court order denying "Hazen's verified motion to reinstate dismissed case" was signed on November 6, 1993 (App.,*infra*, 30a).

The Court of Appeals for the Fourteenth Supreme Judicial District of Texas rendered its judgment (App.,*infra*, 14a) and opinion (App.,*infra*, 1a) filed on December 15,

1994, with an order that same not be published pursuant to Texas Rule of Appellate Procedure 90.

Motion for rehearing filed on December 30, 1994, was overruled on January 19, 1995 (App.,*infra*, 31a).

Application for writ of error to the Supreme Court of Texas was filed on February 21, 1995. The writ was denied on November 16, 1995 (App.,*infra*, 33a). Motion for rehearing was filed on December 1, 1995, which was overruled on December 14, 1995 (App.,*infra*, 35a).

## STATEMENT OF JURISDICTION

The Supreme Court of Texas denied petitioner's application for writ of error with the notation "writ denied" on November 16, 1995 (App.,*infra*, 33a), and motion for rehearing was overruled by said Court on December 14, 1995 (App.,*infra*, 35a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

The judgment and opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas (hereinafter Fourteenth Court of Appeals) was rendered and filed on December 15, 1994 (App.,*infra*, 14a, 1a), and was ordered not to be published.

This is the judgment of the highest court of the State in which a decision could be had of which petitioner seeks a writ of certiorari to review. The proceeding in the Supreme Court of Texas is one of discretionary review.

A motion for rehearing was filed in the Supreme Court of Texas and was overruled on December 14, 1995 (App.,*infra*, 35a).

## CONSTITUTIONAL PROVISION

The Constitutional provision involved in this case is the Fourteenth Amendment, Section 1, which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Petitioner Sara B. Hazen, individually and as temporary administrator of the estate of Rose B. Bashara, deceased, filed her original petition on April 22, 1987, in the then pending estate of Rose B. Bashara, deceased. The trial court ordered that petitioner engage in no discovery.

Although not permitted by the trial court to engage in any discovery, petitioner's attorneys spent many hours and days searching for, reviewing, and obtaining numerous documents deemed necessary for the trial of the case as described in the attorney's affidavit set forth hereinafter.

A motion to dismiss for want of prosecution was filed by defendants Tradd and Evelyn and Melburn G. Cooper on or about May 24, 1993.

A hearing was held on May 28, 1993. The trial court granted this motion and signed its order of dismissal for want of prosecution on August 2, 1993.

After the granting of the motion to dismiss for want of prosecution, information came to the attention of petitioner Hazen's attorneys which they considered to be grounds for recusal.

Petitioner filed her motion for recusal on August 20, 1993 (App.,*infra*, 16a), and her motion to reinstate dismissed case on September 1, 1993.

A visiting judge heard the motion for recusal and denied same by order of September 23, 1993 (App.,*infra*, 29a), without stating his reasons for denial.

A hearing was held on petitioner's motion to reinstate dismissed case on October 22, 1993, which was denied by order of November 6, 1993, also without stating reasons for denial (App.,*infra*, 30a).

An appeal was taken on the order of dismissal, the refusal to reinstate the case, and the refusal to recuse the trial judge.

The Texas Fourteenth Court of Appeals overruled petitioner's points of error, except as to petitioner's points of error regarding the assessment of costs in the order of dismissal and the order denying motion to reinstate dismissed case, modifying the judgment. As modified, it affirmed the trial court judgment (App.,*infra*, 14a and 1a).

The opinion of the court of appeals (App.,*infra*, 1a) correctly states the nature and results of the suit, except in the following particulars:

In the court of appeals opinion (App., *infra*, 3a) the statement is made: "In fact, the record shows no activity whatsoever from March 1990 (the date this court's opinion

issued) to October 1992, a period of approximately 31 months."

Ignored or overlooked by the court of appeals is Paul S. Hazen's affidavit attached to Hazen's response to the motion to dismiss, which states:

"Having determined after a period of time that Coopers and Tradd were not going to bring their case to trial, we resumed the process of extensive informal discovery to check on all the counties and countries for estate assets or potential estate assets by searching all public records available to us.

"In the search of records, I personally reviewed and copied over 10,000 documents. I traveled to over 40 Texas counties, corresponded with officials in over 200 Texas counties, traveled to other states, and corresponded with officials in those states in pursuit of evidence for use in the trial of the matter.

"During this time, I personally spent an average of at least 30 hours per month for a period of over 3 years (from 1990 until 1993) preparing, copying, and researching records, along with correspondence received and reviewed from other states, counties, and countries."

See also Hazen's verified motion to reinstate dismissed case.

The court of appeals in its opinion (App.,*infra*, 1a,10a), cites *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988), and *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed. 2d 855 (1988), which set out the federal test for whether a trial judge should recuse himself. The language of the Texas Rule 18b(2)(a) is similar

to that of the federal statute, i.e., that a judge shall recuse (disqualify) himself in any proceeding in which his impartiality might reasonably be questioned. The court of appeals failed to mention that the test of impartiality of those cases is the view of the average, reasonable person is the standard for analysis as to whether a judge shall recuse (disqualify) himself or herself. Although the view of the "reasonable person" may not always be fair or even accurate, it is the standard to be applied. Instead, the court of appeals opinion relies on the alleged view that attorneys contributions are necessary to a judge's re-election and, thus, not a ground for recusal.

Additionally, the court of appeals predicates its decision on the statement that "Texas courts reject the claim that a judge's acceptance of campaign contributions from lawyers creates bias necessitating recusal."

Hazen's claim is based on the fact that *parties* to this suit made contributions to the trial judge, in addition to lawyers for the parties making contributions.

The court of appeals failed to rule on the question of whether the receipt of political campaign contributions from litigants by a judge should require his recusal.

The court noted petitioner's contention that lack of recusal denied her Constitutional right to a fair and unbiased hearing. It held that the receipt of these campaign contributions in this case did not establish bias or prejudice and petitioners right to a fair trial had not been violated. It failed to apply the standard set out in *Liljeberg v. Health Serv. Acquisition Corp.*, *supra*. The federal statute and the state rule use identical language calling for recusal (or disqualification) in "any proceeding in which his impartiality might reasonably be questioned."

This is a suit seeking a full accounting of all of the funds or properties received by any of the defendants from Sam and Rose Bashara, or either of them or from the estates of Sam and/or Rose Bashara; to declare certain notes, deeds, deeds of trust and an earnest money contract void; cancellation of conveyances and removal of clouds of title; breach of fiduciary duty by parties who were attorneys of the decedents; and other relief as set forth in the plaintiff's petition.

Petitioner prepared and filed a motion for recusal (App.,*infra*, 16a) setting forth facts that certain of the litigants and certain of the attorneys for litigants made certain political campaign contributions and furnished other aid and assistance to the trial judge when he was elected to the bench.

In summary, a total of $4,718.94 of cash contributions were made by parties and their attorneys, and the first temporary administrator, plus the guaranty of a $30,000 bank loan for the political campaign was made by two attorneys. One of the attorneys who guaranteed the loan is a member of the law firm which is a defendant which made campaign contributions. The other is an attorney in the firm representing the law firm defendant and two individual defendants. Also, a person who was appointed by the court as the temporary administrator of this estate prior to appointment of petitioner made a cash contribution. Among the litigants is a law firm which not only made political cash contributions in its name, but also members of that law firm made political cash contributions. The law firm provided office facilities and services to the judge conducting his campaign, for which the campaign reimbursed the firm. Petitioner and her attorneys did not contribute to the campaign.

Willis Witt, a former member of the law firm of Liddell, Sapp, Zivley & Brown, later known as Liddell, Sapp, Zivley & LaBoon, is the attorney who represented the Coopers and Tradd in this case.

Walter P. Zivley is a member of the firm of Liddell, Sapp, Zivley & LaBoon.

Liddell, Sapp, Zivley & LaBoon; Bruce LaBoon, individually; and Robert Brown are defendants in this suit and are represented by the firm of Sewell & Riggs and William E. Matthews of that firm. Another member of the Sewell & Riggs firm is Lawrence J. Pirtle.

First City National Bank, individually, and as guardian of the Estate of Rose D. Bashara, N.C.M., was represented by in-house counsel.

Julius Glickman was appointed by the court as a temporary administrator prior to the appointment of petitioner Hazen.

Sworn statements of contributions and expenditures filed by or on behalf of Judge McCulloch, Judge of Probate Court No. 4, with the county clerk of Harris County, Texas, show the hereinafter set forth contributions to his political campaigns by cash contributions and the guaranty of a loan made by him from Texas Commerce Bank to finance his campaign.

Willis Witt contributed $475.00.

Walter P. Zivley contributed $543.94 and was one of ten guarantors of a loan to Judge McCulloch by Texas Commerce Bank in the amount of $30,000.00 The firm of Liddell, Sapp, Zivley, Hill & LaBoon, successor to the

defendant, contributed $500.00. R. Bruce LaBoon contributed $500.00. Five other members or associates of the Liddell firm contributed $250.00. In addition, Judge McCulloch used the Liddell firm and its office facilities in conducting his campaign and reimbursed that firm in the amount of $733.85. The firm of Sewell & Riggs contributed $550.00 and Lawrence J. Pirtle contributed $150.00. Also, he was one of the ten guarantors of the loan to the Judge from the bank in the amount of $30,000.00.

Julius Glickman contributed $1,000.00.

First City Bank Corporation's political action committee contributed $750.00.

This is a total of $4,718.94 of cash contributions, plus the guaranty of the $30,000.00 political campaign bank loan by the two attorneys, one of whom is a member of the law firm which is a defendant, the other an attorney with the law firm which is attorney for the law firm defendant and two individual defendants. This represents contributions by *defendants* (respondents here) in this lawsuit or their attorneys, together with the previous temporary administrator, to the political campaign war chest of the judge. Petitioner and her attorneys did not contribute.

The federal question was raised first in Hazen's motion for recusal (App.,*infra*, 16a, 24a) in which she alleged that the grounds for the motion to recuse are so serious as to constitute a denial Hazen's Constitutional right to a trial before an impartial tribunal and a deprivation of her rights under the Texas and United States Constitutions.

The motion for recusal was filed on August 20, 1993, after the entry of the order of dismissal for want of prosecution signed on August 2, 1993.

Thereafter, at a hearing by a visiting judge, an order was entered denying Hazen's motion for recusal with no reason stated as to the constitutional question being presented here (App.,*infra*, 29a).

Thereafter, Hazen filed a motion to reinstate dismissed case and incorporated by reference her motion for recusal.

An order denying Hazen's verified motion to reinstate dismissed case was signed on November 6, 1993, without any statement regarding petitioner's claim made here (App.,*infra*, 30a).

Thereafter, petitioner filed as appellant her appeal in the Fourteenth Court of Appeals and in her brief in point of error No. 3 this matter was raised and discussed on pages 28 through 37, in particular at page 34.

Prior to the hearing, petitioner filed her reply brief as appellant and discussed the question again in pages 12 through 25, in particular in pages 18 through 22.

After the rendition of the opinion of the Fourteenth Court of Appeals, petitioner filed her motion for rehearing in that court and raised the question on pages 6 and 7. Prior to the ruling on the motion for rehearing she filed her response to appellees Coopers and Tradd's reply to motion for rehearing, and at pages 2 and 3, discussed the matter.

The court overruled the motion for rehearing and thereafter petitioner filed her application for writ or error in the Supreme Court of Texas. In her application for writ of error she raised the question on pages 32 through 47, and, in particular, pages 39 thorough 42.

In her reply brief, before the Court's ruling, petitioner raised this matter in pages 7 and 8.

After the denial of the application for writ of error by the Supreme Court of Texas petitioner filed her motion for rehearing in that court and in that motion, pages 1 through 3, again raised the question. This motion for rehearing was overruled on December 14, 1995 (App.,*infra*, 35a).

Petitioner would show that the trial judge was biased and prejudiced against petitioner by reason of the following matters.

At the time of appointment of the petitioner as temporary administrator, the trial court ordered that she have no discovery powers. This was repeated in a subsequent order after the conclusion of the trial of the will contest pending at the time she was appointed.

After a hearing on a motion for summary judgment filed by some of the respondents herein, the trial court waited almost a year before ruling on said motion for summary judgment. The court granted the summary judgment and petitioner appealed same to the Fourteenth Court of Appeals which reversed and remanded the case.

Had the movants of said motion for summary judgment tried that case and been successful, the petitioner would not have had any reason to pursue this matter further. However, the trial court never set that case for trial, nor did it set the petitioner's case for trial. Although having been barred from engaging in any conventional discovery, petitioner through her attorneys conducted searches of public records of many counties in Texas, and some in Oklahoma, Louisiana, and Nevada, reviewing over 10,000 documents such as deeds, leases, oil runs, royalty information and

miscellaneous documents, and, in doing so, traveled to approximately 40 Texas counties in this search and obtained over 1,000 exhibits for use in the trial for such matter, most of which were obtained outside Harris County.

The first temporary administrator, who contributed $1,000 to the judge's political campaign, filed a report that the estate consisted of at least $50,000 and the attorneys for some of the respondents had represented that the estate income would be minimal. He reported, however, that: "How do we know it's minimal unless an accounting is, in fact, required?"

Nevertheless, the court never proceeded to set the case for trial. However, at the hearing on the motion to dismiss for want of prosecution, the trial court had evidence before it that showed payments in excess of $388,000 had been made by one of the large oil companies to the respondents and this was income only from a small field in Fort Bend County.

Hazen had previously requested a hearing on her application for appointment as administratrix. The court never conducted such hearing but chose in lieu thereof to hear the motion for dismissal for want of prosecution.

In doing so, the court ignored and failed to comply with the provisions of Section 178 of the Texas Probate Code (App.,*infra*, 37a) requiring it to grant letters testamentary to the executor(s) appointed by the will, or if not, to grant letters of administration in the time period set forth in such statute, if a necessity for administration existed. Surely a necessity for administration existed because of the pendency of this action and the assets disclosed by the first temporary administrator and the existence of the other assets disclosed by the oil company.

Additionally, his failure to recuse himself in response to Hazen's motion for recusal shows bias and prejudice.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner Hazen had a right to have her matter heard by an impartial judge and not one whose impartiality might reasonably be questioned.

It is ridiculous to think that petitioner must have a trial before a judge who has received substantial political campaign contributions and received other assistance in his election to the bench from her adversaries. We are talking about parties to the case and not just attorneys involved in the case. It is even more ridiculous when we add attorneys for the adversaries who contributed to the judge's campaign coffers.

When will the courts of Texas and perhaps other states conclude that dispensing justice by an impartial judge is more important than the re-election efforts on that judge's behalf? When is justice more important than the judge's re-election?

It was a clear abuse of discretion and a denial of Hazen's Constitutional right to due process and equal protection because of failure of the trial judge to recuse himself or ordered to be recused by the visiting judge.

This is a suit seeking a full accounting of all the funds and properties received by any defendants from Sam and Rose Bashara, or either of them or their estates, and related relief.

The respondents in this case are three sisters of the petitioner, the husband of one, a trust of two of these persons and in their capacities as trustees of said trust, one of the sisters individually and as guardian for a period of Rose Bashara, and other guardians of the parents and attorneys who represented some of such defendants during the period in question.

When petitioner was appointed temporary administrator for the estate of the mother of these sisters, Rose Bashara, a will contest was being tried. She was appointed temporary administrator in order to avoid the statute of limitations which would expire the next day in connection with bringing this suit.

Upon her appointment, among other things, she was denied by the trial judge the right to exercise any discovery authorized by the rules.

Several weeks later after conclusion of the trial, she was by supplementary order of the trial judge again denied the right to exercise discovery.

The will of the mother was probated which left her property to two of these respondents and petitioner in equal shares, the fourth sister having been denied any inheritance by the will.

The other two sisters who would inherit under the will several months later instituted a declaratory action

alleging generally that the petitioner should not inherit under the will because of the no contest provision of the will.

Shortly after filing such suit, a motion for summary judgment was filed by these two sisters. A hearing was held and the trial judge sat on the case for approximately 10 months before granting the motion for summary judgment.

This judgment was appealed by the petitioner to the Fourteenth Court of Appeals which after several months entered its judgment reversing and remanding the case to the trial court.

These two respondents never set that case for trial, nor did the court.

Although they were appointed executor and alternate under the will, they never moved to ask the probate court to appoint them as such and issue letters testamentary.

The probate court never appointed any executor of the will nor administrator of the will as Section 178 of the Probate Code required him to do, if a necessity for administration existed (App.,*infra*, 37a).

He had previously appointed a person as temporary administrator who concluded that at least $50,000 belonged to the estate and stated that the attorneys for these two sisters had represented to him that any estate income was minimal. These attorneys are also respondents here. He also commented that how would we know that it was minimal in the absence of an accounting. Yet, the court never took any steps to require an accounting, although petitioner had her suit on file regarding that and related matters. Being subject to the order of the court, she was denied any authority to conduct discovery.

Petitioner's attorneys made an extensive search for documents in preparation for trial on this case, visiting numerous counties in the state and some in other states, and corresponding with practically all the counties in the state to gather this information. Details are in the statement of the case.

Sam Bashara, who predeceased Rose, had been a very active operator in the field of oil and gas and had acquired and disposed of numerous mineral and royalty interests throughout the state, which is the reason for having been required to engage in such extensive research.

At a status conference requested by the petitioner she was assured by the court that her claim would be tried. However, shortly thereafter, when she attempted to bring on for hearing her motion for appointment as administrator with the will annexed the court refused to hear that application, and, instead, heard the motion of the two sisters for dismissal for want of prosecution, filed a scant 5 days previously.

After a hearing on that motion the court on August 2, 1993, signed an order of dismissal.

At about that time petitioner's attorneys came upon information indicating grounds for recusal of the trial judge.

After obtaining political contribution information from the records of the county clerk, petitioner filed a motion for recusal (App.,*infra*, 16a) setting forth these facts. Petitioner in her motion raised the question and alleged that grounds for the motion to recuse are so serious as to constitute a denial of Hazen's Constitutional right to trial before an impartial tribunal and a deprivation of her rights under both the Texas and United States Constitutions.

The trial judge refused to recuse himself and a hearing was held on said motion by a visiting judge who denied the motion (App.,*infra*, 29a).

Thereafter, Hazen filed her verified motion to reinstate dismissed case and said motion incorporated the motion for recusal. This motion was denied by the trial judge (App.,*infra*, 30a).

Thereafter, appeal was taken to the Fourteenth Court of Appeals and in said appeal the federal question was raised. The Fourteenth Court of Appeals rendered its decision and in its opinion (App.,*infra*, 1a) pointed out that the standard of review for denial of a motion to recuse is abuse of discretion. The test for whether the trial court abused its discretion is whether he acted without reference to any guiding rules and principles. Rule 18b(2)(a) requires a judge to recuse himself in any proceeding where his impartiality might reasonably be questioned or in which he has a personal bias or prejudice concerning the subject matter or a party.

Petitioner had cited *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988), and *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), which set out the federal test for whether a trial judge should recuse (disqualify) himself. We urged that court to adopt that rule in its application of Rule 18b(2)(a). In rejecting this claim, the court stated the "Texas courts reject the claim that a judge's acceptance of campaign contributions from lawyers creates bias necessitating recusal."

It cited "*J-IV Inv. v. David Lynn Machine, Inc.*, 784 S.W.2nd 106,107 (Tex. App.--Dallas 1990, no writ) (involved a $500 contribution from appellee); *Rocha v. Ahmad*, 662 S.W. 2d 77, 78 (Tex. App.--San Antonio 1983, no writ)(involved contributions by appellee's counsel to two

justices on the San Antonio court of appeals of 'many thousands of dollars' and holding victory celebrations at the law firm)." It further stated that the San Antonio court of appeals reasoned as follows:

> "It is not surprising that attorneys are the principal source of contributions in a judicial election....A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute, or, worse still, had contributed to that judge's opponent."

The court held that the petitioner had not demonstrated an abuse of discretion in the denial of her motion to recuse.

The court further stated that the petitioner contended the lack of recusal denied her Constitutional right to a fair and unbiased hearing. It held that the receipt of campaign contributions in this case does not establish bias or prejudice, thus her Constitutional right to a fair trial has not been violated, and overruled her point of error.

Actually, the Fourteenth Court of Appeals erred in its reference to *J-IV Inv. v. David Lynn Machine, Inc., supra*, where its parenthetical note states "involved a $500 contribution from appellee." See 784 S.W. 2nd 106 at 107, second column, where it states "In September 1988, counsel

for Lynn, Inc. made a $500 contribution to the trial judge's campaign fund."

Likewise, the *Rocha v. Ahmad* case, *supra*, involved contributions by appellee's counsel.

Thus, the court did not cite any case in which the parties made contributions.

We noted at page 7 of our motion for rehearing in that case, that the *Rocha* case, *supra*, is weak is the most charitable thing we could say. This case was not appealed, and to say that a reasonable person would countenance such a situation is unrealistic. This was a case where the appellate court judges received contributions from appellee's attorney and the appellate court was passing upon their own member's impartiality. It does not involve the case of a trial judge accepting contributions from parties and attorneys, and that action being reviewed by an appellate court. To put the ability of the judge to obtain campaign funds for re-election as justification for such conduct is reprehensible and Hazen reiterates she has been denied her Constitutional right to a fair and impartial hearing.

Both the *Rocha* case, *supra*, and the *J-IV Inv.* case, *supra*, are "no writ" cases.

Rule 18b(2) (a) and (b) of the Texas Rules of Civil Procedure provides as follows:

> "(2) Recusal. A judge shall recuse himself in any proceeding in which:
>
> "(a) his impartiality might reasonably be questioned;

> "(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;..."

Almost identical language as that set out hereinabove is contained in 28 U.S.C. § 455, In re *Faulkner*, 856 F2d 716 (5th Cir. 1988), from which we quote:

> "As pertinent here, section 455 requires disqualification as follows:
>
> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> "(b) He shall also disqualify himself in the following circumstances:
>
> "(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...."

As can be seen, the Texas rule refers to a judge recusing himself whereas the federal statute refers to a judge disqualifying himself. However, it appears that the language is otherwise the same. It further appears that the Texas rule is patterned after the federal statute.

It has been the petitioner's position in this case that the Texas rule should be applied with the same standard as adopted by this Honorable Court in *Liljeberg*, *supra*, that the view of the average, reasonable person is the standard for

analysis as to whether a judge shall disqualify (recuse) himself or herself.

Further, that disqualification or recusal does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew.

And, further, that although the view of the "reasonable person" may not always be fair or even accurate, it is still the standard that must be applied: "[P]eople who have not served on the bench are often all too willing to indulge in suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, *supra*.

We quote from the concurring and dissenting opinion of *Aguilar v. Anderson*, 855 S.W.2d 799, 813-815 (Tex. App.--El Paso 1993, writ denied), written by Justice Barajas, who is at present chief justice of that court.

> "I would submit that the reasonable Texan truly envisions an independent judiciary, based simply on junior high social studies classes that emphasize that all men and women are equal under our laws.
>
> "...Judges are expected to be impartial, while executives and legislators are not. It is for those reasons that a judge should observe high standards of conduct so that the integrity and independence of the judiciary is preserved; conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; refrain from conveying or permitting others to convey the impression that they are in a special position to

influence him or her; and, refrain from financial dealings that tend to reflect adversely on his or her impartiality or exploit his or her judicial position....

"Under our current structure, the position of a jurist in the United States in general, and the State of Texas in particular, is the symbol of both the judicial system and the orderly administration of justice. *See* Texas Lawyer's Creed--A Mandate for Professionalism, Section IV, subsec. 1, Texas Supreme Court adopted November 7, 1989. Public policy demands that a judge who tries a case act with absolute impartiality. *CNA Insurance Company v. Scheffey*, 828 S.W.2d 785, 792 (Tex.App.--Texarkana 1992, writ denied), citing *Prendergass v. Beale*, 59 Tex. 446, 447 (1883). It further demands that a judge appear to be impartial so that no doubts or suspicions exist as to the fairness or the integrity of the court. *Id.*; *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). Judicial decisions rendered under circumstances that suggest bias, prejudice or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the principles on which the judicial system is based. *Sun Exploration and Production Company v. Jackson*, 783 S.W.2d 202, 206 (Tex.1989)(Spears. J., concurring).

"...Another reality is that to the reasonable Texan, attorney contributions, at best, create the appearance of impropriety and, at worst, given the facts of this case, amount to the appearance that justice can be bought at wholesale prices."

This Honorable Court in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), stated:

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.

> "... Indeed, 'justice must satisfy the appearance of justice,' *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954), and this 'stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). See also *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974)."

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), the Court stated:

> "In *Tumey*, while recognizing that the Constitution does not reach every issue of judicial qualification, the Court concluded that 'it certainly violates the Fourteenth Amendment... to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.' 273 U.S., at 523, 47 S.Ct., at 441.
>
> "More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge 'can be a judge in his own case [or be] permitted to try cases where he has an interest in the

> outcome.' *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.' *Ibid.* Nonetheless, a reasonable formulation of the issue is whether the 'situation is one "which would offer a possible temptation to the average...judge to...lead him not to hold the balance nice, clear and true."' *Ward v. Village of Monroeville*, *supra*, 409 U.S., at 60, 93 S.Ct., at 83.'

The Supreme Court stated in *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955):

> "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness....Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

Petitioner submits that these Supreme Court cases are controlling of the facts of this case. How could the trial judge here "hold the balance nice, clear and true" when he is judging the very people who put him in office, who offered and he accepted use of office facilities from which to conduct his campaign, generously supported him with cash contributions, and further generously guaranteed repayment of the bank loan made to finance his campaign for political office.

These are the same people he would look to at the time for re-election. Significantly, he had an interest in the disposition of this case, and as we point out herein, his bias and prejudice against petitioner operated to her disadvantage. What man on the street would not conclude that his impartiality might reasonably be questioned and the petitioner denied her Constitutional right of a trial before an impartial tribunal in violation of her Constitutional right to due process of law.

The question presented is important not only to the jurisprudence of Texas but also all other states which elect their judges in popular elections where campaign contributions are significant with respect to the election of such judges.

Your petitioner has found no opinion written by this Honorable Court directly passing on this question. Petitioner suggests that the due process rights of a litigant certainly outweigh and are more important than the right of a trial judge to be re-elected by use of political campaign contributions from litigants, and, also, as well as lawyers involved in the case.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

**Affirmed as Modified and Opinion filed December 15, 1994.**

**In The**
**Fourteenth Court of Appeals**

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**NO. A14-93-01111-CV**

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**SARA B. HAZEN, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF ROSE D. BASHARA, DECEASED, APPELLANT**

**V.**

**EVELYN B. COOPER, MELBURN B. COOPER, ISABELL B. TRADD, WILLIAM AMAIMO, AND LIDDELL, SAPP, ZIVLEY & LABOON, BRUCE LABOON AND ROBERT BROWN, APPELLEES**

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**On Appeal from Probate Court No. 4**
**Harris County, Texas**
**Trial Court Cause No. 192-342**

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## OPINION

In her appeal from an order dismissing her case for want of prosecution, Sara Hazen raises five points of error challenging the dismissal and the trial court's denial of her

motion to recuse. We modify the orders to delete the assessments of costs against appellant. As so modified, we affirm.

Appellant and appellees Isabell Tradd and Evelyn Cooper are the daughters of Sam and Rose Bashara, who are both deceased. Appellee William Amaimo was a guardian of the Estate of Rose Bashara. Appellees Liddell, Sapp, Zivley & Laboon, acted as attorneys for Sam and Rose Bashara during their lifetime and served as counsel for appellees. Tradd and Cooper, with regard to conveyances of property interests of the Basharas to Tradd and Cooper.

Rose Bashara died on April 22, 1984. In May 1984, Isabell Tradd filed an application for the probate of Rose Bashara's will. Another daughter, Grace Greene, opposed the probate and contested the will. Appellant sought to be, and was, appointed temporary administrator to administer the Estate of Rose Bashara pending determination of the opposition to probate and contest of the will. On April 22, 1987, appellant, individually, and as temporary administrator of the estate of Rose D. Bashara, deceased, filed the original petition contending that appellees had engaged in a scheme to gain control of real property and personalty belonging to Sam and Rose Bashara by means of deceit, coercion, duress, fraud, undue influence, and failure of consideration. Hazen sought to set aside certain conveyances and bring the property back within the estate. The trial court had appointed Hazen temporary administrator with the authority to file such suits. This order contained the following limitation on Hazen's prosecution of the suit:

> Sara B. Hazen be and she is hereby appointed successor temporary administrator of the Estate of Rose D. Bashara, deceased, with the sole and only power and authority to file all

> such suits, if any, as are necessary to collect the assets of the estate, if any, and to request service of process on the Defendants therein named. Sara B. Hazen shall not have the authority to prosecute said suits further, to obtain discovery or to take any other action whatsoever without express subsequent consent of this Court.

On November 3, 1987, appellees Cooper and Tradd filed an original petition for declaratory judgment, seeking a declaration that Hazen had forfeited all property devised to her and any right to take under the will of Rose Bashara. In March 1988, Tradd and Cooper filed a motion for summary judgment on their declaratory judgment action, which the trial court granted in February 1989. The case was appealed to this court and it was reversed and remanded for trial. The record reveals no further action by Tradd and Cooper on this declaratory judgment action. In fact, the record shows no activity whatsoever from March 1990 (the date this court's opinion issued) to October 1992, a period of approximately 31 months.

In October 1992, Hazen filed an application for appointment as administratrix with will annexed and filed a motion for a status conference. In December 1992 and in May 1993, Hazen issued subpoenas to Exxon and to Tradd without court permission, requesting production of documents. Tradd and Cooper filed a motion to dismiss and filed a motion to quash the subpoena issued to Tradd. The trial court held a hearing on the motions in May 1993 and entered an order dismissing the case for want of prosecution on August 2, 1993. Hazen subsequently filed a motion to recuse the trial judge and a motion to reinstate the case. Both motions were denied.

In points of error one and two, Hazen contends the trial court erred in dismissing the case for want of prosecution and in overruling her motion to reinstate the case. A trial court has the inherent power to dismiss cases not prosecuted with due diligence. *State v. Rotello*, 671 S.W.2d 507, 509 (Tex. 1984). Because the decision whether to dismiss a case for want of prosecution rests in the discretion of the trial court, the issue on appeal is whether the trial court committed a clear abuse of discretion. *Id.* In making this decision, the trial court may consider the entire history of a case including any past lack of diligence. *Sustala v. El-Romman*, 712 S.W.2d 164, 166 (Tex. App. -- Houston [14th Dist.] 1985, writ ref'd n.r.e.). Furthermore, plaintiffs are charged with notice of the trial court's intent to dismiss a case by their attorney's knowledge of local rules regarding cases that may be dismissed for want of prosecution. *See Rotello*, 671 S.W.2d at 508. Factors a trial court may consider before dismissing a case are: "(1) the length of time the case was on file; (2) the extent of activity in the case; (3) whether a trial setting was requested; and (4) the existence of reasonable excuse for the delay." *City of Houston v. Malone*, 828 S.W.2d 567, 568 (Tex. App.--Houston [14th Dist.] 1992, no writ). *See also Hosey v. County of Victoria*, 832 S.W.2d 701, 704 (Tex. App.-- Corpus Christi 1992, no writ).

Hazen first argues that the limitation in the order appointing her temporary administrator, which requires court permission to prosecute the suit or conduct discovery, is inapplicable to Hazen individually. Because Hazen filed suit in her individual capacity as well as in her capacity as temporary administrator, Hazen argues that the informal discovery done without court permission constitutes diligence in prosecuting this suit.

In support of her right to bring the suit individually, Hazen cites *Dickson v. Klett*, 211 S.W.2d 381 (Tex. Civ. App.--Galveston 1948, mand. overruled). *Dickson* first states the general rule that suits on causes of action concerning the estate of a deceased must be prosecuted by the personal representative and not the heirs, legatees, or devisees. 211 S.W.2d at 385. The court then notes the exception to this rule allows heirs, devisees, or legatees to sue individually "where the personal representative has neglected or refused to prosecute the suit . . . ." *Id.* Hazen is the personal representative responsible for prosecuting the suit. Therefore, she cannot invoke the exception to the general rule and she has no right to sue individually.

Hazen further contends that there has been due diligence in prosecuting the suit. Regarding the lack of activity from the date suit was filed in 1987 through 1990, Hazen states that she was involved in the summary judgment proceeding and appeal. She reasons that, if appellees had pursued their declaratory judgment action after it was remanded to the trial court and prevailed, Hazen would have had no inheritable interest in the estate of Rose Bashara. Hazen further claims that much informal discovery occurred, consisting of travel across Texas and other states, researching property and court records. She also asserts that she has subpoenaed records of oil production, filed an application for appointment as administrator with will annexed, attended a status conference, which she requested, and requested a trial setting.

The record, however, reveals no request for a trial setting, no request for permission to conduct any discovery, no court-approved interrogatories, requests for production, requests for admissions, or notices of depositions. The subpoenas requesting documents and informal discovery occurred without court approval as required in the order

appointing Hazen temporary administrator. Furthermore, the application for appointment as administrator and motion for status conference were filed after approximately 30 months of no activity.

Hazen cites a number of cases that she believes support her claim that the trial court erred in dismissing her case for want of prosecution, but we find these cases distinguishable.[1] We find no abuse of discretion by the trial

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[1] Hazen cites to a number of cases she claims support reversal of the dismissal in this case. We disagree. Our review of these cases reveals greater diligence by the parties in the cases cited by Hazen than that exhibited by Hazen and her counsel. *Ellmossallamy v. Huntsman*, 830 S.W.2d 299 (Tex. App.--Houston [14th Dist.] 1992, no writ) (dismissal reversed where plaintiff had conducted significant discovery and case was set for trial); *Goff v. Branch*, 821 S.W.2d 732 (Tex. App.--San Antonio 1991, writ denied) (reversed dismissal based on plaintiff's failure to appear because plaintiff established at reinstatement hearing that they were present at the dismissal hearing and had requested a trial setting; record also showed significant activity in prosecution of case); *Fedco Oil Co. v. Pride Refining Co.*, 787 S.W.2d 572 (Tex. App.--Houston [14th Dist.] 1990, no writ) (reversed dismissal of case that had been on file nine years because the record showed a request for trial setting and other activity indicating diligence); *Bishop v. Wollyung*, 705 S.W.2d 312 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.) (upheld trial court's refusal to dismiss case where there was a ten year delay between trial and entry of judgment because both parties had acquiesced in the delay); *Moore v. Armour & Co.*, 660 S.W.2d 577 (Tex. App.--Amarillo 1983, no writ) (reversed dismissal of case on file twelve years because plaintiff had requested a trial setting and announced ready for trial); *Brown v. Prairie View A & M University*, 630 S.W.2d 405 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.) ( reversed dismissal for 28-month delay in making the representative of deceased defendant a party because record showed reasonable diligence); *Davis v. Laredo Diesel, Inc.*, 611 S.W.2d 943 (Tex. Civ. App.--Waco 1981, writ ref's n.r.e.) (reversed dismissal of case on file 20 months for several reasons, including lack of authorization to dismiss when plaintiff merely failed to appear for docket call, failure to provide notice of possible dismissal by registered mail, and companion cases which were on appeal contained issues that might affect

court in determining that Hazen has shown a lack of due diligence in prosecuting this case. Consequently, we overrule points of error one and two.

In point of error three, Hazen claims the trial court erred in overruling her motion for recusal. Hazen contends that the trial judge's acceptance of campaign contributions and other assistance from appellee Liddell, Sapp, Zivley & LaBoon and appellees' attorneys establishes bias requiring recusal.

Hazen filed a motion to recuse Judge McCulloch, contending that his sworn statement of contributions and

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the instant case); *William T. Jarvis Co. v. Wes-Tex Grain Co.*, 548 S.W.2d 775 (Tex. Civ. App.--Waco 1977, writ ref'd n.r.e.) (reversed dismissal of case on file 22 months because, before dismissal, plaintiff filed amended pleadings and obtained a preferential trial setting); *City of Waco v. Texas Coffin Co.*, 472 S.W.2d 800 (Tex. Civ. App.--Waco 1971, writ ref'd n.r.e.) (upheld trial court's refusal to dismiss case on file eight years because defense attorney had suggested companion cases be tried first to determine liability of city and plaintiff demonstrated diligence); *City of Austin v. Hall*, 446 S.W.2d 330 (Tex. Civ. App.--Austin 1969) ( unusual case wherein appellate court upheld trial court's refusal to dismiss case on file over twelve years because plaintiff continued to hope for settlement), *writ dism'd*, 450 S.W.2d 836 (Tex. 1970); *Craig v. State*, 433 S.W.2d 713 (Tex. Civ. App.--Tyler 1968, writ ref'd n.r.e.) ( condemnation case with unusual facts in that attorney for state became the trial judge for two and a half years; upheld refusal to dismiss because of peculiar fact situation and plaintiff had obtained trial settings); *Molter v. Equitable Discount Corp.*, 418 S.W.2d 262 (Tex. Civ. App.--San Antonio 1967, no writ) (trial court had overruled motion to dismiss case on file 14 years where appellee had engaged in discovery and announced ready for trial); and *Rorie v. Avenue Shipping Co.*, 414 S.W.2d 948 (Tex. Civ. App.--Houston 1967, writ ref'd n.r.e.) (reversed dismissal of case on file over five years because appellant had diligently prosecuted case for eight months preceding dismissal and had announced ready for trial three times).

expenditures for his political campaigns show cash contributions by appellees' trial counsel, Willis Witt, by the law firm of Liddell, Sapp, Zivley, and LaBoon and additional contributions by two named partners and five other members of the firm. These records also showed that Judge McCulloch used the offices of the Liddell, Sapp firm in conducting his campaign. The records showed additional contributions by the law firm of Sewell & Riggs, a member of that firm, Julius Glickman, and the First City Bank Corporation political action committee. The total of these contributions is less than $5,000.00. Two of these contributors also acted as guarantors of a $30,000.00 loan to Judge McCulloch.

After receiving appellant's motion to recuse, Judge McCulloch followed the procedure under Rule 18a and requested the presiding judge of the administrative judicial district to hear the motion. Judge James Blackstock, heard the motion and arguments of counsel and denied the motion. The order denying the motion did not state the basis for denial.

Appellees argue that the motion for recusal was properly denied because it was not timely filed. Rule 18a requires filing of a motion to recuse a trial judge "[a]t least ten days before the date set for trial or other hearing . . . ." Tex. R. Civ. P. 18a(a). Hazen claims that her motion was timely filed and cites *CNA Ins. Co. v. Scheffey*, 828 S.W.2d 785 (Tex. App.--Texarkana 1992, writ denied) in support of this contention.

In *Scheffey*, the defendant moved to recuse the trial judge after trial, alleging the following bases: (1) while the case was pending, the plaintiff and the plaintiff's attorney and his wife made contributions to the trial judge's election campaign. (2) the plaintiff's attorney and the trial judge had

a close association long before the judge was elected to the bench, (3) before his election, the trial judge used the law offices of the plaintiff's attorney to conduct legal business, (4) the trial judge had given the plaintiff's attorney ten court appointments, and (5) the pretrial and trial rulings in favor of the plaintiff raised the appearance of impropriety. *Id.* at 792. The defendant also alleged it did not learn of these matters until after trial. *Id.* The trial judge declined to recuse himself and referred the motion to the presiding judge of the administrative judicial district, who refused to hear the motion on the ground that it was untimely filed. *Id.* at 793. Although the appellate court recognized that appellant filed its motion after trial, it was filed more than ten days before the date set for the hearing on the motion for new trial. *Id.* Therefore, the court held that the motion was timely filed and reversed and remanded the case for a hearing on the motion. *Id.*

In this case, Hazen filed her motion to recuse on August 20, 1993, after the order dismissing the case, but more than ten days before hearing on the motion to reinstate the case. Thus, under *Scheffey*, we find that Hazen's motion to recuse the trial judge, with respect to the hearing on the motion for reinstatement only, was timely filed.

The standard of review for denial of a motion to recuse is abuse of discretion. *Aguilar v. Anderson*, 855 S.W.2d 799, 801 (Tex. App.--El Paso 1993, writ denied). The test for whether the trial court abused its discretion is whether he acted without reference to any guiding rules and principles. *Id.* Rule 18b(2) requires a judge to recuse himself in any proceeding where his impartiality might reasonably be questioned or in which he has a personal bias or prejudice concerning the subject matter or a party. Tex. R. Civ. P. 18b(2)(a)-(b).

Hazen cites *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988) and *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847 (1988) which set out the federal test for whether a trial judge should recuse himself. The federal recusal statute provides for a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C.A. § 455 (1993). In *Liljeberg*, the court stated:

> We conclude that in determining whether a judgment should be vacated for a violation of §455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judgicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice'."

486 U.S. at 864. In *Liljeberg*, the trial judge was a trustee of the university which had an interest in the litigation. *Id.* at 851. In *Faulkner*, the trial judge was related to a participant in transactions forming the basis of certain indictments and this participant had communicated facts, opinions, and attitudes to the judge. 856 F.2d at 718-19.

Although the Texas recusal rule also contains a provision regarding the appearance of partiality, Texas courts reject the claim that a judge's acceptance of campaign contributions from lawyers creates bias necessitating recusal. *See, e.g., J-IV Inv. v. David Lynn Machine, Inc.*, 784 S.W.2d 106, 107 (Tex. App.--Dallas 1990, no writ) (involved a $500.00 contribution from appellee); *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App.--San Antonio 1983, no writ) (involved contributions by appellee's counsel to two

justices on the San Antonio court of appeals of "many thousands of dollars" and holding victory celebrations at the law firm). The San Antonio court of appeals reasoned as follows:

> It is not surprising that attorneys are the principal source of contributions in a judicial election. . . . A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or worse still had contributed to that judge's opponent.

*Rocha*, 662 S.W.2d at 78. We hold that, under the facts of this case, appellant has not demonstrated an abuse of discretion in the denial of her motion to recuse.

Hazen also contends the lack of recusal denied her Constitutional right to a fair and unbiased hearing. We have held that the receipt of campaign contributions in this case does not establish bias or prejudice. Thus, Hazen's constitutional right to a fair trial has not been violated. We overrule point of error three.

In points of error four and five, Hazen claims the trial court order of dismissal and order denying the motion to reinstate are void because the orders award costs to appellees. The two orders assess all costs associated with the

proceeding against Hazen.

Rule 131 provides for recovery of costs by the successful party. Tex. R. Civ. P. 131. This rule is inapplicable to a dismissal for want of prosecution because there is no "successful party." A "successful party" under Rule 131 is one who obtains a "judgment of a competent court vindicating a civil claim of right." *Mixon v. National Union Fire Ins. Co.*, 806 S.W.2d 332, 335 (Tex. App.--Fort Worth 1991, writ denied); *Stewart v. Group Health & Life Ins. Co.*, 555 S.W.2d 531, 534 (Tex. Civ. App.--Waco 1977, no writ). If the court assessed costs under this rule, it committed error because a dismissal is not an adjudication of the merits of a case or the rights of the parties. *Alvarado v. Magic Valley Elec. Co-op., Inc.*, 784 S.W.2d 729, 733 (Tex. App.--San Antonio 1990, writ denied). A dismissal merely returns the parties to the position they were in before the filing of the suit. *Id.*

In support of the assessment of costs, appellees cite Rules 141 and 133. Rule 141 allows a trial judge to assess costs other than as provided under the rules "for good cause, to be stated on the record . . . ." Tex. R. Civ. P. 141. In this case, the trial court did not state good cause for assessing costs in favor of appellees. Thus, we cannot uphold the assessment of costs under this rule. Rule 133 permits a court to award costs on motions. Tex. R. Civ. P. 133. The costs awarded in this case, however, included all costs incurred in the entire proceeding, not just the costs associated with the motions to dismiss and to reinstate. Having found no authority for the trial court's assessment of all costs against appellant in this case, we hold the trial court abused its discretion in awarding such costs. We sustain points of error four and five to the extent they challenge the assessment of costs.

Although we do not find that the trial court's award of such costs renders the order of dismissal or the order denying reinstatement void, we modify the order of dismissal by ordering the dismissal without prejudice. We likewise modify the order of dismissal and the order denying reinstatement by deleting the assessments of costs against appellant. Except as so modified, we affirm the trial court's judgment.

/s/ J. Curtiss Brown
Chief Justice

Judgment rendered and Opinion filed December 15, 1994.

Panel consists of Chief Justice J. Curtiss Brown, and Justices Murphy and Ellis.

Do not publish - Tex R. App. P. 90.

## APPENDIX B

DECEMBER 15, 1994.

## JUDGMENT

### The Fourteenth Court of Appeals

SARA B. HAZEN, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF ROSE D. BASHARA, DECEASED, APPELLANT

NO. A14-93-01111-CV V.

EVELYN B. COOPER, MELBURN B. COOPER, ISABELL B. TRADD, WILLIAM AMAIMO, AND LIDDELL, SAPP, ZIVLEY & LABOON, BRUCE LABOON AND ROBERT BROWN, APPELLEES

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This cause, an appeal from an order of dismissal signed August 2, 1993, came on to be heard on the transcript of the record. We have inspected the record and find error in the judgment. We therefore **REFORM** the judgment of the court below to delete the assessment of costs against appellant, Sara B. Hazen, Individually and as Temporary Administrator of the Estate of Rose D. Bashara, Deceased. We also order the dismissal without prejudice.

We order the remainder of the judgment **AFFIRMED** except as heretofore modified.

We order appellees, Evelyn B. Cooper, Melburn B. Cooper, Isabell B. Tradd, William Amaimo, and Liddell, Sapp, Zivley & Laboon, Bruce Laboon and Robert Brown,

jointly and severally, to pay all costs incurred because of this appeal.

We order this decision certified below for observance.

**APPENDIX C**

NO. 192,342-401

| | | |
|---|---|---|
| IN RE: ESTATE OF | * | IN PROBATE COURT |
| | * | NO. 4 |
| ROSE D. BASHARA, | * | OF |
| | * | HARRIS COUNTY, |
| DECEASED | * | TEXAS |

HAZEN'S MOTION FOR RECUSAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES SARA B. HAZEN and files her Motion for Recusal at least ten days before the date set for trial or hearing on Hazen's Motion to Reinstate and would show unto this Honorable Court the following:

I.

The grounds why the Judge before whom the case is pending should not sit in this case are that the Judge should recuse himself by reason of the provisions of Rule 18b(2) (a) and (b) of the Texas Rules of Civil Procedure, and, further, his failure to do so is error under Due Process and Equal Protection Clauses of the United States Constitution, and the Due Process Clause of the Texas Constitution.

II.

Rule 18b(2)(a) and (b) provide as follows:

"(2) Recusal. A judge shall recuse himself in an proceeding in which:

"(a) his impartiality might reasonably be questioned;

"(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; ..."

III.

Only recently, and since the granting of the motion to dismiss for want of prosecution filed by Isabell B. Tradd, Evelyn B. Cooper, and Melburn G. Cooper, information has come to the attention of Sara B. Hazen and her attorneys which we believe are grounds for recusal of the judge before whom the case is pending, namely, William C. McCulloch, as is shown hereinafter.

IV.

The lawsuit which was dismissed for want of prosecution is no. 192,341-401 in Probate Court No. 4, Harris County, Texas, styled Sara B. Hazen, Individually and as Temporary Administrator of the Estate of Rose D. Bashara, Deceased, Plaintiff vs. Evelyn B. Cooper, Individually and as Trustee of the Evelyn B. Cooper and Melburn G. Cooper Trust; Melburn G. Cooper, Individually and as Trustee of the Evelyn B. Cooper and Melburn G. Cooper Trust; Isabell Tradd, Individually and as Guardian of Rose D. Bashara, N.C.M.; William Amaimo, Individually and as Guardian of the Estate of Rose D. Bashara, N.C.M.; Liddell, Sapp, Zivley & LaBoon; Bruce LaBoon, Individually; Robert Brown; Grace B. Greene; American Bank and Trust, Individually and as Guardian of the Estate of Rose D. Bashara, N.C.M.; First City National Bank,

Individually and as Guardian of the Estate of Rose D. Bashara, N.C.M.; and Earnest B. Caldwell, Defendants.

V.

This is a suit seeking a full accounting of all of the funds or properties received by any of the defendants from Sam Bashara and Rose Bashara, or either of them or from the estates of Sam and/or Rose Bashara; to declare certain notes, deeds, deeds of trust, and an earnest money contract void; cancellation of conveyances and removal of clouds of title; and other relief set forth in plaintiff's petition.

VI.

This petition was filed on April 22, 1987, by Sara B. Hazen, individually and as temporary administrator of that estate, under appointment by the court.

VII.

The defendants Evelyn B. Cooper, Melburn G. Cooper and Isabell Tradd are and have been represented by Willis Witt, a former member of the law firm of Liddell, Sapp, Zivley & Brown, later known as Liddell, Sapp, Zivley & LaBoon.

VIII.

The defendants, Liddell, Sapp, Zivley & LaBoon, Bruce LaBoon, individually, and Robert Brown, are represented by the firm of Sewell & Riggs and William E. Matthews of that firm. Another member of the Sewell & Riggs firm is Lawrence J. Pirtle. Walter P. Zivley is a member of the firm of Liddell, Sapp, Zivley & LaBoon.

IX.

First City National Bank, individually, and as guardian of the Estate of Rose D. Bashara, N.C.M. was represented by house counsel.

X.

Julius Glickman, of the firm of Glickman and Barnett, was appointed by this Court as a temporary administrator and prepared and filed with the Court a written recommendation to the Court on whether or not litigation should be filed to recover money or properties allegedly due to the Estate of Rose Bashara. This report was filed on or about February 25, 1987.

XI.

An examination of sworn statements of contributions and expenditures filed by or on behalf of Judge McCulloch with the County Clerk of Harris County, Texas, revealed, inter alia, the following contributions to the political campaigns of Judge McCulloch by cash contributions and the guaranty of a loan by Judge McCulloch from Texas Commerce Bank to finance his campaign.

XII.

Willis Witt contributed $475.00.

XIII.

Walter P. Zivley contributed $543.94 and was one of ten guarantors of a loan to Judge McCulloch by Texas Commerce Bank in the amount of $30,000.00. The firm of Liddell, Sapp, Zivley, Hill & LaBoon, successor to the

defendant, contributed $500.00. R. Bruce LaBoon contributed $500.00. Various members or associates of the Liddell firm contributed $50.00 each, namely, Stephanie Donaho, Michael Dorman, Andrea L. Ferguson, Frank A. Liddell, Jr., and Gordon E. Nichols. In addition, Judge McCulloch used the Liddell firm and its facilities in conducting his campaign and reimbursed that firm in the amount of $733.85. The firm of Sewell & Riggs contributed $550.00, and Lawrence J. Pirtle contributed $150.00. Additionally, he was one of ten guarantors of the loan to Judge McCulloch from Texas Commerce Bank in the amount of $30,000.00.

XIV.

Julius Glickman, the temporary administrator, contributed $1,000.00.

XV.

First City Bank Corporation Political Action Committee contributed $750.00.

XVI.

The total contributions by the Liddell firm, its members, associates and attorneys is $2,493.,94, and, additionally, two of ten guarantors of the $30,000.00 loan were made by members of the Liddell firm or its attorneys. Judge McCulloch's association with that firm is further exemplified by the fact that it appeared to have been a base of operation for his campaign in view of the reimbursements for campaign expenses made by him to it. The attorney Witt contributed $475.00, the temporary administrator Glickman contributed $1,000.00, and finally, First City Bank Bancorporation Political Action Committee contributed

$750.00. This is a total of $4,718.94 in cash contributions, plus the guaranty of a $30,000.00 political loan by the two attorneys Zivley and Pirtle.

XVII.

In April, 1986, Sara Hazen petitioned the Court to appoint her as temporary administrator with full power to file lawsuits, preserve assets of the estate, take charge of oil-producing properties, and basically, full powers as an administrator. No action was taken by the Court on this application for approximately a year, and in the interim, the Court appointed Julius Glickman as temporary administrator to investigate and report to the Court.

The Court finally, just a few days prior to the expiration of statute of limitations, entered an order appointing Sara Hazen as temporary administrator. Hazen immediately came to Houston, qualified, and was able to file the lawsuit described in Paragraph IV. on the last day of the period of limitations.

However, her hands were tied by the Court as shown hereinbelow.

XVIII.

On September 25, 1987, Judge McCulloch rendered a certain modified order appointing successor temporary administrator. This order provided, inter alia,

> "1) Sara B. Hazen be and she is hereby appointed successor temporary administrator of the Estate of Rose D. Bashara, deceased, with the sole and only power and authority to file all such suits, if any, as are necessary to collect the assets of the

estate, if any, and to request service of process on the Defendants therein named. Sara B. Hazen shall not have the authority to prosecute said suits further, to obtain discovery or take any other action whatsoever without express subsequent consent of this Court.

"2) This order shall have force and effect as of April 22, 1987.

" . . .

"Sara B. Hazen, as such temporary administrator, shall continue to exercise said powers until the termination of the contest of Grace Greene to said will of Rose D. Bashara, deceased, and the appointment of an executor or an administrator with full power, and until further order of this Court."

XIX.

By the terms of this order Sara B. Hazen as temporary administrator had no authority to prosecute this suit by means of discovery or otherwise to prepare such suit for trial. There was absolutely no reason or basis for "tying the hands" of the temporary administrator from proceeding with the prosecution of the suit.

As set out hereinabove, the defendants, their attorneys, the attorney for other defendants, and the initial temporary administrator, Glickman, all were contributors to the political campaign of Judge McCulloch and thus stood to gain an advantage by the terms of that order and the "tying of the hands" of the temporary administrator Sara Hazen.

After a hearing on April 29, 1988, on a motion for summary judgment filed by defendants Cooper and Tradd against Hazen in Cause No. 192,342-005 in the Bashara estate, Judge McCulloch rendered a summary judgment in favor of said Cooper and Tradd and against Hazen on February 27, 1989. This summary judgment found that Hazen violated Article IIIA of the Last Will and Testament of Rose D. Bashara, deceased, and, accordingly, she forfeited all property devised to her under said Will, together with any right to take under the Will; and her share in the estate passed to the said Cooper and Tradd. This summary judgment, however, was appealed to the Fourteenth Court of Appeals. By its judgment rendered and an opinion filed on March 8, 1990, the appellate court reversed the judgment of the trial court and remanded the case for hearing on the merits.

XXI.

Three years have passed since the judgment was rendered by the appellate court and Judge McCulloch has never set that case on the dismissal docket for want of prosecution, but instead has elected to dismiss the subject case, which is an effort on Hazen's part to recover assets for the estate, primarily against the said Cooper and Tradd.

XXII.

While "tying the hands" of the temporary administrator Hazen in the order referred to hereinabove, Judge McCulloch has failed to appoint an independent executor or administrator, or authorize Hazen as temporary administrator, to prosecute this case to recover assets for the estate, in violation of the Probate Code, because to do so might result in judgment against, inter alia, those defendants named herein who contributed to his political campaign.

XXIII.

Judge McCulloch wholly failed to disclose the close political ties he has with defendant and the attorneys named hereinabove to Hazen and/or her attorneys.

XXIV.

Judge McCulloch has committed fundamental error in rendering the order dismissing this cause for want of prosecution.

XXV.

As further evidence of the Court's extreme dislike for Hazen and her counsel, the Court harbored such bias and prejudice that it committed such egregious violations of law by not appointing Cooper and/or Tradd as independent executrix of the Will of Rose D. Bashara, deceased, as mandated by law, Texas Probate Code Section 178. Judge McCulloch has ignored and refused to comply with Section 178 of the Probate Code by failing to do the mandatory act of appointment. Judge McCulloch in the course of the entire case has manifested a personal bias or prejudice against Hazen and her counsel. Judge McCulloch's lack of impartiality is readily apparent with each encounter. Regrettably, this complete disregard for the rules and Hazen's rights is typical of Judge McCulloch's treatment of Hazen and her counsel in the past. There is no adequate remedy at law. Judge McCulloch has consistently exhibited his bias and partiality against Hazen and her counsel that necessitates this motion for recusal. The grounds for the motion to recuse are so serious as to constitute the denial of Hazen's constitutional right to trial before an impartial tribunal and a deprivation of her rights under both the Texas and United States Constitutions. Judge McCulloch's

unilateral disregard for following the letter of the law is manifestly clear on the face of this motion. A clear abuse of discretion has been established because under the circumstances of this case taken as a whole, the facts and the law permit the trial court to make but one decision. There is no judicial discretion involved. Judge McCulloch's outside interests have slanted his opinions of Hazen and her counsel to such a degree that Judge McCulloch has refused to follow the clear duty under the law, Texas Probate Code Section 178(b). There is no judicial discretion involved. However, if it were construed that Judge McCulloch had any discretion on the issue, he would have clearly abused such discretion. The facts and the law permit Judge McCulloch to make one decision: appoint Cooper as independent executrix of Rose D. Bashara. Summarily denying or refusing to do his duty as required is not an option.

XXVI.

Sara B. Hazen says that she is entitled to a hearing before an impartial judge who has no personal bias or prejudice concerning the subject matter or Hazen, and in view of these facts does not believe she can obtain one unless this motion is granted and this judge either recuses himself or is recused by a judge assigned by the presiding judge of the administrative judicial district.

WHEREFORE, PREMISES CONSIDERED, SARA B. HAZEN prays that this motion be considered and acted upon in accordance with the provisions of Rule 18a of the Texas Rules of Civil Procedure and for such other and further relief to which she may be entitled.

Respectfully submitted,

/s/ Paul J. Smith
PAUL J. SMITH
Suite 500
1001 Texas Avenue
Houston, Texas 77002
(713) 271-2413
State Bar NO. 18662100
Fax No. (713) 526-0950

EDWIN I. McKELLAR, JR.
10497 Town & Country Way, Suite 209
Houston, Texas 77024-1105
(713) 464-1086
State Bar NO. 13702000

ATTORNEYS FOR SARA B. HAZEN

STATE OF TEXAS ]
COUNTY OF HARRIS ]

BEFORE ME, the undersigned authority, personally appeared Paul J. Smith, who, being duly sworn, deposed and said:

My name is Paul J. Smith. I am an attorney for Sara B. Hazen. I am over the age of 18 years of age, and am competent to make this affidavit.

I have personal knowledge of the facts stated in the foregoing motion for recusal and they are true and correct.

/s/ Paul J. Smith
PAUL J. SMITH

SUBSCRIBED AND SWORN TO before me by the said PAUL J. SMITH on the 20th day of August, 1993.

/s/ Jesus M. Lopez, Jr.
Notary Public in and for
the State of Texas
JESUS M. LOPEZ, JR.
Notary's Name Printed
My Commission expires: 4/23/97

NOTICE

Please take notice that the foregoing motion is expected to be presented to the Judge three days after the filing of such motion unless otherwise ordered by the Judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard in accordance with the provisions of Rule 18a of the Texas Rules of Civil Procedure.

/s/ Paul J. Smith
PAUL J. SMITH

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was served on each of the defendants, or their attorneys of record, on this 20th day of August, 1993, by certified mail, return receipt requested.

/s/ Paul J. Smith
PAUL J. SMITH

## APPENDIX D

NO. 192,342-401

| | | |
|---|---|---|
| IN RE: ESTATE OF | § | IN PROBATE COURT |
| | § | NO. 4 |
| ROSE D. BASHARA, | § | OF |
| | § | HARRIS COUNTY, |
| DECEASED | § | TEXAS |

**ORDER DENYING**
**"HAZEN'S MOTION FOR RECUSAL"**

BE IT REMEMBERED that on the 23rd day of September, 1993, there came on to be heard in due order the Motion for Recusal filed by Sara Hazen. The Court proceeded and considered the Motion, the Oppositions thereto, argument of counsel, and all other matters properly before it. After being fully comprised, the Court is of the opinion and so finds that Hazen's Motion for Recusal should be denied.

IT IS THEREFORE ORDERED that the Motion for Recusal filed by Sara Hazen be and hereby is denied. Costs assessed against Movants. JB

SIGNED at Houston, Texas, this 23rd day of September, 1993.

/s/
JUDGE PRESIDING

Recorder's Memorandum
All blackout, additions and changes
were present at the time the instrument
was filed and recorded.

## APPENDIX E

NO. 192,342-401

| | | |
|---|---|---|
| IN RE: ESTATE OF | § | IN PROBATE COURT |
| | § | NO. 4 |
| ROSE D. BASHARA, | § | OF |
| | § | HARRIS COUNTY, |
| DECEASED | § | TEXAS |

**ORDER DENYING "HAZEN'S VERIFIED MOTION TO REINSTATE DISMISSED CASE"**

Be it remembered that on the 22nd day of October, 1993, there came on to be heard "Hazen's Verified Motion to Reinstate Dismissed Case," filed by Sara B. Hazen. The Court duly considered such Motion, Oppositions filed by Defendants. argument of counsel. and all other matters properly before it. After being fully apprised, the Court finds that such Motion is without merit and should be denied.

It is, therefore, ORDERED that Sara Hazen's "Verified Motion for Reinstatement of Dismissed Case" be and hereby is denied.

It is further ORDERED that all costs pertaining to such Motion be and they hereby are taxed against Sara B. Hazen, with execution to issue if such costs are not timely paid.

Signed at Houston, Texas, this 6 day of November, 1993.

/S/
Judge, Probate Court No. Four
of Harris County, Texas

## APPENDIX F

**FOURTEENTH COURT OF APPEALS**
**1307 San Jacinto, 11th Floor**
**Houston, Texas 77002**

January 19, 1995

Paul J. Smith
440 Louisiana
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10497 Town & Country Way
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Todd A. Kissner
Tekell, Bood, Matthews
& Limmer
3600 Two Houston Center
909 Fannin
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William E. Matthews
Sewell & Riggs
800 MCorp Plaza
333 Clay Ave.
Houston, TX 77002

Scott Rothenberg
Law Offices of
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Suite 160
Bellaire, TX 77401

Dimitri Zgourides
Tekell, Book, Matthews
& Limmer L.L.P.
909 Fannin Street
Suite 3600
Houston, TX 77010

Claude R. Treece
Sewell & Riggs
800 MCorp Plaza
333 Clay Avenue
Houston, TX 77002

Willis Witt
1100 Louisiana
Suite 4825
Houston, TX 77002

RE: Court of Appeals Number: 14-93-01111-CV
Trial Court Case Number: 192,342-401

Style: Hazen, Sara B.
v.
Cooper, Evelyn, Et Al

Dear Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, February 20, 1995.

MARY JANE SMART, DEPUTY

By Charlene Mitchell
Chief Deputy

## APPENDIX G

**THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

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November 16, 1995

Mr. Edwin I. McKellar, Jr.
10497 Town & Country Way
Suite 209
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Mr. Paul J. Smith
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Mr. Dimitri Zgourides
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Mr. William E. Matthews
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Houston, TX 77002-4086

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Mr. Robert E. Hudson
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Mr. William B. Allison
Sewell & Riggs
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Houston, TX 77002

Mr. Claude R. Treece
Sewell & Riggs
800 MCorp Plaza
333 Clay Street
Houston, TX 77002

Mr. Scott Rothenberg
Law Offices of Scott Rothenberg
4710 Bellaire Blvd., Suite 160
Bellaire, TX 77401-4505

RE: Case Number 95-0200

Style: SARA B. HAZEN, individually and as temporary administrator of the estate of ROSE D. BASHARA, deceased

v.

EVELYN B. COOPER, MELBURN B. COOPER, ISABELL B. TRADD, WILLIAM AMAIMO, and LIDELL, SAPP, ZIVLEY & LABOON, BRUCE LABOON and ROBERT BROWN

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK
BY: /s/ Michael C. Murphey
Michael C. Murphey, Deputy Clerk

## APPENDIX H

**THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

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December 14, 1995

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333 Clay Street
Houston, TX 77002

Mr. Scott Rothenberg
Law Offices of Scott Rothenberg
4710 Bellaire Blvd.,
Suite 160
Bellaire, TX 77401-4505

RE: Case Number 95-0200

Style: SARA B. HAZEN, individually and as temporary administrator of the estate of ROSE D. BASHARA, deceased v. EVELYN B. COOPER, MELBURN B. COOPER, ISABELL B. TRADD, WILLIAM AMAINO, and LIDELL, SAPP, ZIVLEY, & LABOON, BRUCE LABOON, and ROBERT BROWN

Dear Counsel:

Motion for rehearing of application for writ of error in the above referenced case was this day overruled.

Sincerely,

John T. Adams, Clerk
by /s/
Courtland Crocker
Deputy

# APPENDIX I

## TEXAS PROBATE CODE

§ 178 (a) Letters Testamentary. When a will has been probated, the court shall, within twenty days thereafter, grant letters testamentary, if permitted by law, to the executor or executors appointed by such a will, if any there be, or to such of them as are not disqualified, and are willing to accept the trust and qualify according to law.

(b) Letters of Administration. When a person shall die intestate, or where no executor is named in a will, or where the executor is dead or shall fail or neglect to accept and qualify within twenty days after the probate of the will, or shall neglect for a period of thirty days after the death of the testator to present the will for probate, then administration of the estate of such intestate, or administration with the will annexed of the estate of such testator, shall be granted, should administration appear to be necessary. No administration of any estate shall be granted unless there exists a necessity therefor, such necessity to be determined by the court hearing the application. Such necessity shall be deemed to exist if two or more debts exist against the estate, or if or when it is desired to have the county court partition the estate among the distributees, but mention of these two instances of necessity for administration shall not prevent the court from finding other instances of necessity upon proof before it.